IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 45 OF 2007
WITH
CIVIL APPLICATION NO. 867 OF 2007
IN
SECOND APPEAL NO. 45 OF 2007

Shri Noormahammad Amir Mokashi .. Appellant.

V/s.

Shri Musa Babalal Jamadar .. Respondent.

Mr. A.M.Kulkarni for the Appellant.

CORAM : S. A. BOBDE, J.

DATED : 17th JULY, 2007.

P.C. :-

. The appellant in this second appeal sued the original defendant against whom the lower appellate court has decreed the suit for declaration and injunction in respect of the C.S.No.692/A; the measurement of which is given as 164.06 square meters.

2. Apparently the city survey no. 692/A was the subject matter of the earlier suit between the parties. That suit was filed by the present appellant in which he was delivered the suit property. The appellant in the witness box admitted that he had no evidence to show that he received possession of more than 68.02 square

meters, while receiving possession of the suit property.

3. Mr.Kulkarni, the learned counsel for the appellant vehemently argued that the judgment of the court below suffers from an error as it holds that the entire C.S.No. 692/A was not handed over to the appellant. According to the learned counsel, in fact, as a result of the earlier decree, the entire city survey no. 692/A was handed over to the appellant. Therefore, if the respondent wanted to obtain a declaration and injunction in respect of that land, his only remedy was to prefer an application under section 144 of the Code of Civil Procedure.

4. Having heard the learned counsel for the appellant, it is not possible to accept his contention. The judgment of the appellate court, vide para 15, is based on an admission made by the appellant in the cross-examination that he has no document to show that he has received possession of more than 68.02 square metres. The appellate court has found that in the earlier suit, the appellant was delivered possession of a triangular portion marked ‘A’‘B’‘C’ in the map and now, therefore, it was erroneous on the part of the trial court to hold that the possession of the entire city survey No.692/A had been handed over to the

appellant in a regular darkhast No. 49/1985 on 11.11.1986. The judgment in the earlier suit has received finality before this court in second appeal No.107 of 1977. In any case, having regard to the nature of the submission it is clear that the question raised is purely a bone of fact i.e. the area which was handed over to the appellant is a result of the earlier decree on 11.11.1986.

5. It is not possible to accept the contention advanced on behalf of the appellant that since the respondent was claiming a declaration and injunction in respect of the property which was handed over to the appellant in earlier suit, he was restricted to, and bound to invoke section 144 of the Code of Civil Procedure. Therefore, he was not entitled to agitate the question in another suit. Section 144 reads as under :

> "S.144. Application for restitution :- (1) Where and in so far as a decree [or an order] is [varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may

be, place the parties in the position which they would have occupied but for such decree [or order] or [such part thereof as has been varied, reversed, set aside or modified] and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly [consequential on such variation, reversal, setting aside or modification of the decree or order].

[Explanation.-- For the purpose of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,--

. (a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

. (b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

. (c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.]

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief

which could be obtained by application under sub-section (1).

6. The said section deals with the question of restitution where the decree is reversed. No question of reversal of a decree in the earlier suit has arisen.

7. In the circumstances, there is no merit in the second appeal, which is hereby dismissed. As a result, nothing survives in the Civil Application.

8. The S.A.with the civil application is disposed of accordingly.

(S.A.BOBDE,J.)

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